

January 27, 2006

David Munson  
(202) 457-6127  
dmunson@pattonboggs.com

***Via Electronic Filing***

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Re: **Ex Parte Notice**  
CC Docket No. 02-6

Dear Ms. Dortch:

On Thursday, January 26, 2006, Carly Didden and David Munson of Patton Boggs LLP (counsel to SEND Technologies/Nexus Systems) met with Ian Dillner of Commissioner Tate's office to urge prompt action on pending requests made by certain school districts located in the State of Louisiana for review of Universal Service "E-rate" Program funding denials. The discussion generally tracked the attached presentation, which was provided to Mr. Dillner.

As the attachment explains, at least 15 Louisiana school districts have filed requests for review of E-rate funding denials issued by the Universal Service Administrative Company (USAC), most of which have been pending at the FCC since August 2004 and cover the funding year 2002. These school districts rely upon E-rate funding to defray the costs (by as much as 90 percent) of internal connections and/or Internet access service to some 145 individual schools in the State. Each of these school districts has taken on evacuees (in some cases, both students and teachers) from areas of the State ravaged by hurricanes Katrina and Rita, increasing their need for internal connections and Internet access lines to accommodate this influx. At the same time, all Louisiana schools are facing potentially severe funding reductions, due to the hurricane's impact on the State's economy. Many of these school districts are located entirely within or encompass rural areas whose economies were already stretched thin. The combination of these factors imperils the ability of these 15 school districts to continue to pay for these vital services at a time when they need these services more than ever to accomplish their educational missions.

USAC's denials of the school districts' E-rate funding applications are generally predicated upon one of two bases (in one case, both bases were cited): (1) Alleged non-compliance with the competitive bidding requirements in Title 38 of the Louisiana Revised Statutes, as interpreted by USAC; and/or

January 27, 2006

Page 2

(2) Perceived “similarities” in the Form 470 applications that suggested (to USAC) a “pattern” of impermissible involvement by the service provider in the competitive bidding process. The first basis was invalidated by the Louisiana Attorney General, and the second was effectively invalidated by USAC itself in subsequent funding years. Because there appears to be a high likelihood of success on the merits of the pending appeals, prompt processing is likely to result in prompt remand back to USAC, where it is believed that the funding at issue would be restored.

In sum, the sooner these school districts’ requests for review are processed by the FCC, the sooner they are likely to obtain restoration of E-rate funds that should have been dispersed in 2002 and subsequent years.

Pursuant to Section 1.1206(b) of the Commission’s rules, an electronic copy of this letter is being filed with the office of the Secretary. Please contact the undersigned if there are any questions or comments associated with this notice.

Respectfully submitted,

/s/ David Munson

David Munson  
Counsel to SEND Technologies, LLC/Nexus Systems, Inc.

Enclosure

cc: Ian Dillner (Commissioner Tate’s office)

# **Louisiana Schools Request Urgent Processing Of Pending Requests for Review of E-rate Funding Denials**

## **1. Louisiana Schools Caught In Regulatory Limbo**

- The fifteen (15) Louisiana school districts (covering some 145 schools) listed on the attached table obtain internal connections and Internet services from SEND Technologies/Nexus Systems, a Louisiana-based company.
- These schools obtain a large portion (as much as 90 percent) of the funding for these services through the FCC's Universal Service Program for Schools and Libraries (also known as the "E-rate" program).
- All 15 school districts had their funding requests for the year 2002 (and in some cases, also 2003 and 2004) denied by the Universal Service Administrative Company (USAC) for one of two reasons, and subsequently appealed those denials to the FCC.
- Most of these appeals have been pending at the FCC since August 2004 and cover the funding year 2002.

## 2. The Two Legal Grounds For USAC Denial Have Been Rejected By Competent Authorities

The denials are generally predicated upon one of two bases (in one case, both bases were cited):

**Basis 1:** Alleged non-compliance with the competitive bidding requirements in Title 38 of the Louisiana Revised Statutes, as interpreted by USAC, and

**Basis 2:** Perceived “similarities” in the Form 470 applications that suggested (to USAC) a “pattern” of impermissible involvement by the service provider in the competitive bidding process.

As explained below, the first basis was invalidated by the Louisiana Attorney General, and the second was invalidated by USAC itself in subsequent funding years.

***First Basis.***

**Title 38 is inapplicable**

The Louisiana Attorney General issued an opinion indicating that (i) the Internet services contracts are not subject to Title 38 at all, and (ii) the internal connections contracts did not meet the dollar threshold to be applicable, but even if they did, the E-rate program's competitive bidding process would meet the state's procurement requirements.

***Summary*** – The competent authority on Louisiana state law rejected USAC's Title 38-based grounds for denial.

## **Second Basis. USAC's Denials Based Upon Pattern Analysis of "Similarities" is Invalid**

**Similarity One:** "Similarities" in the Form 470 identifier numbers used by the schools.

The schools use their school district numbers as assigned by the state as their Form 470 identification numbers. USAC itself now acknowledges that this is not a valid concern.

**Similarity Two:** "Similarities" in the service descriptions.

The schools, in conjunction with training seminars run by USAC and various vendors, developed a template for service descriptions (note that each school requested different services in varying quantities to meet their individual need). USAC itself now acknowledges that this is not a valid concern.

**Similarity Three:** "Similarities" in the mailing of the Form 470 applications.

For the 2002-2003 funding year only, SEND Technologies/Nexus Systems, permitted the school districts to use its FedEx account for the sole purpose of sending their already completed certification pages for the Form 470 applications to USAC. This was a courtesy to the schools of *de minimis* value (\$16.00) and provided them with means to ensure that their applications would be delivered with confirmation of receipt (loss of the application would result in loss of funding, so delivery was critical to the schools). Many of the schools did not even use SEND Technologies/Nexus Systems' FedEx account, and some that did chose other service providers.

**Summary** – USAC itself has rejected the validity of two of the three alleged "similarities" and has acknowledged that there cannot be a "pattern" analysis based on just one similarity. Accordingly, USAC effectively has mooted the "similarity" grounds.

### **3. Louisiana Schools Need Prompt Action On Their Pending Requests For Review**

The schools are in urgent need of processing their pending requests for review:

- Throughout the State of Louisiana, more than 226,000 students are currently displaced.
- Each school listed in the attached table has taken on evacuees (in some cases, both students *and* teachers) from areas of the State ravaged by hurricanes Katrina and Rita – and the evacuee numbers listed are very likely severely under-reported.
- At the same time, all Louisiana schools are facing potentially severe funding reductions, also due to the hurricane's impact on the State's economy.
- Indeed, Governor Kathleen Babineaux Blanco announced on November 2 that United States Department of Agriculture Secretary Mike Johanns recently declared 40 parishes in Louisiana to be primary agricultural disaster areas.
- Many of these school districts are located in or encompass rural areas whose economies were already stretched thin.

The combination of these factors imperils the ability of these 15 school districts to continue to pay for these vital services at a time when they need these services more than ever to accomplish their educational missions.

Indeed, according to Louisiana Education Superintendent Cecil J. Picard:

"Nearly half of Louisiana's 68 school systems were facing serious financial difficulties before Hurricanes Katrina and Rita struck. Yet these systems took a leap of faith and enrolled displaced students, knowing it would increase their financial burdens. Now the strain of absorbing thousands of students and teachers has brought these systems to the brink of bankruptcy. They did their part to help those hurt by the storms. These children, and the school systems that took them in, are now counting on the federal government to provide the assistance they so desperately need."

Because there is a high likelihood of success on the merits of the pending appeals, prompt processing is likely to result in prompt remand back to USAC, where it is believed that funding would be restored.

**Summary** – Prompt processing by the FCC is likely to result in the prompt restoration of E-rate funds that should have been dispersed back in 2002.



**Louisiana Schools Served By SEND Technologies/Nexus Systems  
With Pending Appeals Of E-Rate Program Funding Denials**

<b>School Board / District</b>	<b>Evacuee students / teachers<sup>1</sup></b>	<b>Monies in Issue<sup>2</sup></b>	<b>Date FCC appeals filed</b>	<b>Funding Year</b>
DeSoto Parish	56	\$87,480	July 27, 2004	2002
Tensas Parish	253 / 3	\$115,500	July 27, 2004	2002
Bienville Parish	43	\$181,550	Aug. 17, 2004	2002
Madison Parish	100 / 5	\$152,180	Aug. 17, 2004	2002
Caldwell Parish	50	\$66,087	Aug. 23, 2004	2002
Catahoula Parish	140 / 1	\$92,740	Aug. 23, 2004	2002
Claiborne Parish	102	\$130,830	Aug. 23, 2004	2002
Concordia Parish	493	\$119,730	Aug. 23, 2004	2002
Franklin Parish	126 / 3	\$148,200	Aug. 23, 2004	2002

---

<sup>1</sup> Counts as of Sept. 16, 2005. Displacement counts are probably low, as many in "shelters" have not even reported to schools yet. Further, only 39,518 students have been recorded as "displaced," but school closures reportedly forced 186,565 from their former classes, which suggests that many have not resettled yet (although some presumably have moved out of state).

<sup>2</sup> These amounts represent the total amount charged to the school for the services. As much as 90 percent of these charges may be reimbursed by the E-rate program, but the precise percentage would be determined by the Schools and Libraries Division of the Universal Service Administrative Company (USAC) if FCC appeals were successful and USAC did not make up a new reason to deny the applications funding, as it has done previously.

**Louisiana Schools Served By SEND Technologies/Nexus Systems  
With Pending Appeals Of E-Rate Program Funding Denials**

<b>School Board / District</b>	<b>School Board / District</b>	<b>Monies in Issue</b>	<b>Date FCC appeals filed</b>	<b>Funding Year</b>
Lincoln Parish	528 / 5	\$94,800	Aug. 23, 2004	2002
Webster Parish	167	\$291,524	Aug. 23, 2004 April 25, 2005	2002, 2003
Winn Parish	123	\$194,975	Aug. 23, 2004	2002, 2004
Morehouse Parish	125 / 1	\$361,400	Aug. 23, 2004 Jan. 10, 2005	2002, 2003, 2004
Richland Parish	88 / 1	\$102,180	Aug. 23, 2004	2002
Jackson Parish	50	\$206,624	Jan. 10, 2005	2003, 2004
<b>Totals</b>	<b>2444 / 19</b>	<b>\$2,345,800</b>		